UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

SHEFFIELD BARBERS, LLC,	
and,	**Cases 28-CA-199308**
	28-CA-205735
NELLIS BARBERS ASSOCIATION,	**28-CA-210447**
and,	**Case 28-CA-209734**
UNCHONG THROWER, an Individual.	

RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW Respondent Sheffield Barbers, LLC ("Sheffield" or "Respondent"), by and through undersigned counsel, and for its Proposed Findings of Fact and Conclusions of Law, states as follows:

FINDINGS OF FACT

I. Relevant Pleadings.

A. Barbara Dyson's Initial Charge.

On or around May 22, 2017 Barbara Dyson ("Dyson") filed a charge against Sheffield with the National Labor Relations Board ("NLRB") designated charge number 28-CA-199308. (GC-1(a)). On June 6, 2017, Dyson filed an amended charge ("amended charge"). In her amended charge, Dyson alleged: (1) "[i]n the past six months, [Sheffield] interfered with, restrained, and coerced its employees in the exercise of rights protected by Section 7 of the Act by making threats of unspecified reprisals and statements of futility about collective bargaining;" (2) "[i]n the past six months, [Sheffield] has failed to bargain collectively and in good faith with the Nellis Barbers Association by making unilateral changes to the terms and conditions of employment;" (3) "[b]y these and other acts, [Sheffield] has interfered and restrained its employees in the exercise of rights

guaranteed by Section 7 of the Act… [and] has restrained and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act." (GC-1(a)). In her charge, Dyson claimed to be president of the Nellis Barbers Association. (GC-1(a)).

B. Dyson Scheduling Charge.

On September 15, 2017, Dyson filed amended charge designated 28-CA-205735 against Sheffield. (GC-1(c)). Dyson alleged Sheffield "discriminated against [her] by changing her schedule in order to discourage union activities or membership and because Dyson filed charge with the Board in 28-CA-199308." (GC-1(c)). Beyond that, this charge reiterated the allegations from charge 28-CA-199308, including that "[i]n the past six months, [Sheffield] interfered with, restrained, and coerced its employees in the exercise of rights protected by Section 7 of the Act by making unilateral changes to the terms and conditions of employment for its employees…" and that "[b]y these and other acts, [Sheffield] has restrained and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act." (GC-1(c)).

On November 15, 2017, Dyson filed a second amended charge to add, "[i]n the past six months, [Sheffield] has maintained overly broad and unlawful rules in its employee handbook." (GC-1(c)).

On January 31, 2018, the NLRB withdrew the first of these allegations against Sheffield—that is, that Sheffield discriminated against Dyson by changing her schedule in order to discourage union activities or membership because Dyson filed the first charge. (Tr. 522). The other allegations are covered by Dyson's first charge, number 28-CA-199308.

C. Third Charge.

On November 13, 2017, Loren Un Chong Thrower ("Thrower") filed a charge against Sheffield ("Thrower's Charge"), designated 28-CA-209734. Thrower's Charge alleges

Sheffield"discriminated against employee Un Chong Thrower by discharging her in order to discourage union activities or membership" and "discriminated against employee Un Chong Thrower by discharging her because [she] provided evidence and/or gave testimony to the Board." (GC-1(e)).

D. Fourth Charge

On November 29, 2017, Dyson filed a first amended charge, designated charge number 28-CA-210447. (GC-1(f)). In this charge, Dyson alleged that, over the past six months, Sheffield (1) "interfered with, restrained, and coerced its employees in the exercise of rights protected by Section 7 of the Act by making statements of futility about collective bargaining and the National Labor Relations Board and its processes[;]" (2) "[s]ince about November 5, 2017, [Sheffield] has failed to bargain collectively and in good faith with Nellis Barbers Association, by making unilateral changes to the rates of pay for employees[;]" and (3) "[b]y these and other acts, [Sheffield] has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act." (GC-1(f)).

E. Consolidated Complaint.

On December 22, 2017, Acting Regional Director Stephen E. Wamser ("Wamser") issued an Order consolidating the complaints into a consolidated complaint (the "Consolidated Complaint"). (GC-1(g)).

In the Consolidated Complaint, the General Counsel, Stephen Kopstein, alleged that on or around May 1, 2017, Respondent assumed a contract to operate a barbershop at Nellis Air Force Base ("Nellis") from Geno Morena Enterprises, LLC ("GME") and "continued to operate the business of GME in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees of GME," and "about April 28, 2017, Respondent

interviewed for employment and committed to hiring a majority of the employees who were previous employees of GME." (GC-1(g), ¶ 4(e)-(f)).

Further, the General Counsel alleged Respondent engaged in surveillance of employees engaged in protected activities by "[telling] former employees to find out what other employees were discussing," telling employees to "shut up" after the employees indicated the Nellis Barbers Association had a collective bargaining agreement with GME, telling employees "it was futile to have the Union as their bargaining representative," telling employees their CBA with GME was fake and did not exist, and by "[a]bout November 22, 2017, telling its employees it was dealing with a federal agency higher than the NLRB. (GC-1(g), ¶¶ 5(a)-5((c)). Based on the above, the General Counsel alleged Respondent "has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed In Section 7 of the Act in violation of Section 8(a)(1) of the Act." (GC-1(g), ¶ 8).

Next, the General Counsel alleged "[a]bout November 9, 2017, and again on November 10, 2017," Respondent's employee Thrower engaged in concerted activities by "complaining to Respondent about new policies being imposed on Respondent's employees, Respondent micromanaging its employees, and Respondent not paying employees for working past their scheduled work time." (GC-1(g), ¶5(d)). The General Counsel alleged Respondent, on November 11, 2017, issued a warning to Thrower and discharged her, all because Thrower engaged in protected concerted activities and filed a charge with the NLRB. (GC-1(g), ¶5(d)-(f)). According to the NLRB, Sheffield's alleged actions with respect to constituted violations of Sections 8(a)(1) of the Act because Sheffield "has been discriminating in regard to the hire or tenure, or terms or conditions of employment, of its employees, thereby discouraging membership in a labor organization." (GC-1(g), ¶ 8).

The General Counsel further alleged that, on or around May 1, 2017, Respondent "reduced the sales commission of its employees in the Nellis Barbers Association ("Union" or "Association") from 45.2% to 33%; began requiring its employees in the Union to pay for and provide their own marvacide and paper towels; began requiring its employees in the Unit to keep customer credit card receipts in the open rather than in the cash register; and began requiring its employees in the Unit to pay for the cost differential of improperly processed coupons." (GC-1(g), ¶ 7(d)). The General Counsel further alleged that, on or about September 25, 2017, "Respondent changed the sales commission of its employees in the Unit from 33% to 45%" and around October 23, 2017, "Respondent reduced the sales commission of its employees in the Unit from 45% to 33%." (GC-1(g), ¶¶ 7(e-f). With respect to the above, General Counsel alleged these issues were mandatory subjects of bargaining and Respondent engaged in the conduct described without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the conduct in violation of Sections 8(a)(1) and 8(a)(5) of the Act. (GC-1(g), ¶¶ 7(g-h)).

D. Answer To Consolidated Complaint.

On October 31, 2017, Sheffield filed its Answer to the Consolidated Complaint, denying all material allegations and raising several affirmative defenses thereto. (GC-1(k)).

II. Testimonial Evidence.

A. Testimony of Christina Deardeuff.

i. Personal Background.

Christina Deardeuff ("Deardeuff") is an owner/operator of Sheffield. (Tr. 52). Sheffield has been in business since July 1, 2014. (Tr. 53). It operates barbershops at six military bases. (Tr. 53). Sheffield began operating barbershops at Nellis Air Force Base on May 1, 2017. (Tr. 54).

Deardeuff testified the bidding process for government contracts starts with the solicitation. (Tr. 52). The Department of Labor includes, in Exhibit J of the bid solicitation, a wage determination or, sometimes, a CBA. (Tr. 52-53). Depending on whether there is a CBA included in the solicitation, Deardeuff may have some discretion in determining employee compensation. (Tr. 53).

ii. Knowledge of CBA at Nellis

Deardeuff testified Sheffield received no CBA after obtaining the bid solicitation from Army Air Force Exchange Services ("AAFES"). (Tr. 116). Moreover, Sheffield asked AAFES whether there was a CBA at Nellis and the response was there that was no CBA. (Tr. 117-118). Based on this evidence, Deardeuff understood there was no CBA or union at Nellis. (Tr. 132). Deardeuff therefore also doubted the validity of any purported CBA at Nellis. (Tr. 138).

iii. Nellis Contract – First Contact.

Deardeuff recognized GC-5, a letter dated March 3, 2017, sent to the barbers at Nellis. (Tr. 60). In response to GC-5, Sheffield received job applications from the Nellis barbers prior to April 7, 2017. (Tr. 61-62).

iv. Job Fair.

Deardeuff attended the April 28, 2017 job fair at Nellis. (Tr. 64). At the job fair, Yvonna Bays ("Bays"), Sheffield's contract manager, introduced the owners and the company. (Tr. 65). Bays mentioned wages offered and looked at Deardeuff, who stated the commission rate would be 33%. (Tr. 65). Bays asked the employees to raise their hands if they were interested in employment at the end of the meeting. (Tr. 65).

After the job fair, some barbers went to GME's barbershop. (Tr. 70). Deardeuff told barbers who were still at the job fair that everyone had to be out of the building by 8 o'clock

because the doors were being locked. (Tr. 71). Deardeuff told the remaining barbers to go get the barbers who were in the barbershop and make sure they leave the premises. (Tr. 71-72).

v. April 29, 2017 Meeting.

Sheffield informed the barbers of the commission rate on April 28, 2017. (Tr. 74). The barbers wanted to discuss the commission, so there was another meeting on April 29, 2017 between Sheffield and the barbers. (Tr. 74). Deardeuff said Sheffield could not afford to pay the employees more than 33% commission. (Tr. 75).

vi. Sheffield Commission Increase.

In August 2017, Sheffield increased barbers' compensation by 12%. (Tr. 84). This change was mentioned in a bargaining session. (Tr. 85). Four pay periods later, the commission rate went back down. (Tr. 85). Deardeuff indicated the commission rate always stayed 33%, but Sheffield paid an additional 12% compensation to the barbers for as long as it was able to. (Tr. 200-203). This change was brought up during a bargaining session. (Tr. 200). Sheffield said at the bargaining session it planned to request fee relief from AAFES, but AAFES denied it. (Tr. 200-201).

vii. Thrower Termination.

Deardeuff previously terminated at least one Sheffield employee for bullying, harassment, or intimidation. (Tr. 90).

Thrower was counseled for refusing to work late and close the shop. (Tr. 95). Deardeuff was on the phone when Thrower's insubordination was discussed. (Tr. 93-96). After that conversation, Deardeuff received a call from Trixie Monroe ("Monroe") where Myoung Suk Kim ("Kim") was also on the line. (Tr. 97). Kim indicated she closed for Thrower, that Kim believed this action resulted in Thrower receiving discipline, and that Kim wished Sheffield would not write Thrower up. (Tr. 98). Kim was distraught, crying inconsolably, and was very upset with something

Thrower said to her. (Tr. 98). Based on Thrower's insubordination and bullying, Deardeuff decided to discharge Thrower. (Tr. 99; GC-12 and GC-13).

Deardeuff discussed the decision with Dyson. (Tr. 99). After the call with Kim, Deardeuff and Monroe met with Dyson in the office (with Deardeuff on the phone). (Tr. 99). Monroe and Deardeuff explained the termination and Thrower's treatment of Kim to Dyson because Dyson was president of the Nellis Barbers Association. (Tr. 99). Dyson agreed with the decision. (Tr. 99).

GC-14, a note with certain definitions written on it, was issued under the direction of Thrower. (Tr. 105). Thrower told Monroe to write out definitions on paper so the other Korean speaking employees would know what it meant. (Tr. 105).

B. <u>Testimony of Kim.</u>

Kim is an employee of Sheffield. (Tr. 142).

i. Thrower Termination .

The day before Thrower's termination, Thrower told Kim to close the shop. (Tr. 145). Kim recalled that Monroe had told Thrower to help Monroe close the shop. (Tr. 145). Thrower told Monroe that Kim knew how to close out and told Monroe "[Kim] will do everything." (Tr. 146). After that, Thrower "just left." (Tr. 146). Kim "only had an experience of closing up the shop twice," and did not know how to do it by herself. (Tr. 146).

The next day, Thrower was very angry with Kim, but Kim did not understand why. (Tr. 147). Kim told Thrower to stop and Thrower shouted at Kim, "what do you know?" (Tr. 147). Kim believes Thrower was terminated because of Kim. (Tr. 155). Thrower told Kim she had been disciplined because Kim did not know how to close the shop and did not properly close the shop. (Tr. 156). Kim went and asked Monroe if she could withdraw the discipline to Thrower. (Tr. 156).

Kim testified she was "a little bit" afraid and "uncomfortable" with Thrower because Thrower "has a temper, a very fiery temper." (Tr. 157). Kim testified she would go along with whatever Thrower insisted. (Tr. 158). Kim went along with Thrower when Thrower told her to close the shop. (Tr. 158).

Kim was not aware of any other employment issues at Nellis besides Thrower's termination. (Tr. 150-151).

Kim testified she wanted to be at the hearing to provide testimony. (Tr. 142). Kim later testified she told Thrower via text she hated to be at the hearing. (Tr. 152). Kim also stated she was frustrated about coming to the hearing. (Tr. 150).

C. Testimony of Trixie Monroe

i. Personal Background and Employment.

Monroe is employed by Sheffield as the shop manager. (Tr. 237). In her capacity as shop manager, Monroe handles cash deposits and transactions, opening and closing the shop, and is authorized to discipline the barbers. (Tr. 237). Monroe began working for Sheffield in October 2017. (Tr. 238).

ii. Interactions With Thrower.

Monroe first met Thrower on November 9, 2017. (Tr. 239). On November 9, 2017, Monroe told Thrower to clear out the area underneath her sink. (Tr. 239-240). Monroe also told Thrower that, when a barber rings up a customer at the cash register, he or she should have another barber observe the transaction. (Tr. 240). Monroe reiterated this instruction to Thrower after observing Thrower ring up a customer alone. (Tr. 240). At that point, Thrower questioned Monroe's authority to give instructions. (Tr. 240). Thrower then made a scene in the shop in front of customers. (Tr. 241). Thrower belittled and embarrassed Monroe, including stating in a mocking

tone that the barbers were to be treated like children and cannot be trusted with money. (Tr. 241). Thrower aggressively and mockingly asked Monroe, "are you watching," while Thrower rang up a customer. (Tr. 241).

Thrower expressed frustration that "the barbers had not had a supervisor for a while" and "it had been fine." (Tr. 240). Thrower yelled at Monroe, saying Monroe was "going to come in and mess up things more." (Tr. 242). According to Monroe, Thrower did not complain she or the other barbers were being "micromanaged." (Tr. 242). Thrower did not understand why she needed to have a barber observe her ringing up customers. (Tr. 242-243). Monroe explained that someone was there "just in case" of a mistake or if something was forgotten in case there was a discrepancy with the money. (Tr. 243). Monroe later disciplined Thrower =for being disrespectful and insubordinate by yelling at Monroe on the shop floor. (Tr. 243).

The next day, November 10, 2017, Thrower, Kim, and Monroe were scheduled to close the barbershop. (Tr. 243). Earlier that day, Monroe told Thrower she was expected to stay past 5:00 pm to close with Monroe. (Tr. 244). Monroe told Thrower she was closing that day because Monroe recalled Thrower had been a manager and "knew how to close." (Tr. 244). In response to Monroe's instruction to help her close the shop on November 10, 2017, Thrower sarcastically stated, "I guess I'm closing with you." (Tr. 244). Thrower never asked Monroe if she could leave. (Tr. 244). Instead, Thrower packed her things without Monroe's knowledge or authorization and left the hsop. (Tr. 245). On her way out the door, Monroe testified Thrower stated, "I'm sorry, I have dinner reservations. Suk [Kim] knows how to close." (Tr. 245).

Monroe denied Thrower asking about compensation for she and Kim for staying after 5:00 pm. (Tr. 245). There was no time for conversation regarding pay because Thrower was immediately "out the door." (Tr. 246).

iii. Thrower Termination.

On November 11, 2017, Thrower, Dyson, and Monroe were working. (Tr. 246). Monroe was going to discipline Thrower for insubordination and disrespectful behavior on November 9, 2017, and for insubordination in refusing to stay and close the shop on November 10, 2017. (Tr. 246). Monroe disciplined Thrower relating to her refusal to stay through the shop closing on November 10, 2017, placed the discipline in Thrower's file, and sent it to the Sheffield's home offices in Missouri. (Tr. 248). Before lunch, Monroe told Thrower Sheffield would not tolerate bullying or yelling on the shop floor. (Tr. 251).

Monroe testified she was on the phone with Sheffield when Kim and Dyson entered, Kim was crying. (Tr. 250). Prior to discharging Thrower, Monroe learned from Dyson that Thrower was "a hothead" who "gets real upset real quick." (Tr. 252). Dyson also stated that Thrower "set herself up [for termination]" and that Thrower "deserved it." (Tr. 257).

Monroe believed Dyson should be involved in the decision because she was president of the union. (Tr. 253). Monroe first told Dyson to discharge Thrower, but Dyson refused to discharge Thrower because Dyson told Monroe "there was going to be a big scene." (Tr. 252). Dyson was afraid to discharge Thrower. (Tr. 253). Dyson and Monroe discussed the written warnings and the punishments and Dyson agreed. (Tr. 257). Dyson agreed to the termination decision and signed off on the documents relating thereto. (Tr. 256). It was not until two days after the discharge that Dyson had a "change of heart" and asked if Thrower could be suspended for two weeks but not terminated. (Tr. 256). At the time of the incidents, Dyson was 100 percent supportive of terminating Thrower. (Tr. 256). Dyson expressed concern to Monroe that Thrower would be upset with Dyson for siding with Monroe. (Tr. 256).

Later, on November 11, 2017, Monroe terminated Thrower for bullying Kim, insubordination for continuing to yell and scream at Monroe, and for bullying Monroe. (Tr. 248-249). At first, the discipline was a written warning, but it became a termination based on Thrower's bullying of Monroe, bullying of Kim, and the substance of the conversation during Kim's meeting with Dyson, Deardeuff, and Monroe. (Tr. 246, 249-250).

Monroe has no knowledge that Thrower was engaged in concerted activities on or around November 11, 2017. (Tr. 258). Deardeuff told Monroe Dyson was president of the union; Dyson herself "never presented herself as the president" and "never gave [Monroe] any documents." (Tr. 258).

D. Testimony of Maria Carpenter.

i. Employment.

Maria Carpenter ("Carpenter") is a barber employed by Sheffield. (Tr. 269). Carpenter was an assistant manager for GME and handled payroll. (Tr. 271). Carpenter received the e-mails from Sheffield in April 2017. (Tr. 275).

ii. Job Fair.

Carpenter attended the job fair on April 28, 2017. (Tr. 275). Like the other employees, she testified Sheffield told the barbers the pay rate would change at the job fair. (Tr. 278). Carpenter was upset the rate was changing. (Tr. 278-279).

Ruben Romero stood up and asked if that was all Sheffield could pay. (Tr. 279). Sheffield said it was. (Tr. 279). The barbers went to the barbershop after the job fair and discussed setting up another meeting to further discuss the commission rate. (Tr. 280-281).

Carpenter received the employee handbook at the job fair. (Tr. 291). She reviewed and signed a certificate of understanding on May 1, 2017. (Tr. 291). Carpenter agreed it was her choice

to come to training with knowledge of Sheffield's commission rate. (Tr. 294). On April 27, 2017, Carpenter received a list of supplies the barbers would be required to provide under Sheffield ownership. (Tr. 296). Carpenter testified GME supplied vacuums and the barbers had to pay for them under Sheffield. (Tr. 298).

Carpenter agreed the items necessary to accept employment had not been completed as of April 27, 2017. (Tr. 311). Carpenter testified GME was her employer at the time she and the other barbers went back into the barbershop after the April 27, 2017 job fair. (Tr. 313-314). Carpenter was still assistant manager. (Tr. 314).

iii. April 29, 2017 Meeting.

Carpenter attended the April 29, 2017 meeting at the rental house. (Tr. 281). Carpenter testified the barbers attempted to negotiate with Sheffield, but Sheffield would not bargain. (Tr. 281). Dyson spoke up and said she was president of the barbers association. (Tr. 283). After the meeting, the commission rate stayed 33%. (Tr. 283).

E. <u>Testimony of Barbara Dyson.</u>

i. Background.

Dyson is president of the Association. (Tr. 324). Dyson received the correspondence from Sheffield in March 2017 (GC-5 and GC-6). (Tr. 329).

ii. Job Fair.

Dyson attended a job fair on April 28, 2017. (Tr. 331-332). She testified not knowing what she would be paid prior to raising her hand at the job fair. (Tr. 332). She testified the barbers were asked to raise their hands if they were interested in employment, and they all did. (Tr. 331-332).

Dyson admitted the barbers talked about a walkout on the night of the job fair, April 27, 2017. (Tr. 335). The barbers decided to talk to Sheffield about the commission rate again. (Tr.

335). They did so on April 29, 2017. (Tr. 336). On April 29, 2017, the barbers were informed Sheffield would not pay higher than 33%. (Tr. 336). Bays told Dyson the CBA was potentially fake. (Tr. 336-337). Sheffield told the barbers Sheffield had taken out a $215,000 loan. (Tr. 337).

Dyson later stated, "the 33% [commission rate] was brought up when we were asked if we wanted the job." (Tr. 356-357). Dyson testified the discussion regarding the commission rate " could have been before or after or in between when the sisters were introduced." (Tr. 359). Dyson stated she was not "certain on that." (Tr. 359).

Dyson acknowledged Ruben Romero spoke up about the 45% commission rate at the job fair. (Tr. 371). Dyson testified in her sworn affidavit from May 30, 2017 that she forgot someone spoke up about the prior commission rate being 45% at the April 27, 2017 job fair. (Tr. 370-371).

iii. Starting Employment.

Dyson acknowledged when Sheffield took over the contract the shop changed with all new equipment and different supplies. (Tr. 376-377). Dyson admitted the discussion in the barbershop after the job fair was part of a discussion about not working for Sheffield. (Tr. 384). Dyson chose to work for Sheffield after knowing the commission rate. (Tr. 385). Dyson signed the employee handbook on May 2, 2017. (Tr. 387). Dyson did not give the CBA to Sheffield even though she acknowledged Sheffield requested a copy. (Tr. 374).

iv. Bargaining.

Dyson filed the first charge on May 22, 2017. (Tr. 389). She did not recall requesting to bargain with Sheffield prior to that date. (Tr. 389-390). After she filed the charge, Sheffield reached out to set up bargaining. (Tr. 390). Sheffield has bargained with Dyson a few times over the phone. (Tr. 390-391).

Dyson admitted Sheffield requested copies of the CBA at Nellis and that she did not provide any copies to Sheffield. (Tr. 374). Dyson further admitted after Sheffield took over the shop, its appearance completely changed and all new equipment and items were installed. (Tr. 376-77).

v. Thrower Termination

Dyson testified she signed Thrower's discipline. (Tr. 346). Dyson also testified she did not see any disciplinary write ups signed by her. (Tr. 346). Dyson testified seeing one written discipline of Thrower torn up. (Tr. 340). She later testified Exhibit 13 was the torn up disciplinary document directed at Thrower. (Tr. 345). Dyson claimed she recommended suspending for one or two weeks instead of termination. (Tr. 347).

F. <u>Testimony of Loren Un Chong Thrower.</u>

i. Employment with Sheffield.

Thrower received the March 2017 e-mail from Sheffield regarding the job fair. (Tr. 427).

ii. Job Fair.

Thrower attended the job fair on April 27, 2017. (Tr. 427). At the job fair, Sheffield told the barbers the commission rate would be 33%. (Tr. 429). At the job fair, Sheffield asked the barbers to raise their hands if they wanted employment. (Tr. 428). At the meeting after the job fair, Sheffield said the commission rate was 33%. (Tr. 429).

iii. April 29, 2017 Meeting.

During the April 29, 2017 meeting, Thrower asked if there was any chance the commission rate could be what it was under the predecessor, 45.2%. (Tr. 453). Thrower reviewed the employee handbook after the job fair. (Tr. 459).

iv. Disciplinary Issues.

Thrower was upset that a manager was assigned to the barbershop. (Tr. 435). Thrower was upset there was an issue with stealing. (Tr. 435). Thrower recalled Monroe telling her to stay and close on November 10, 2017. (Tr. 436). Thrower instead left at 5:15 pm and told Monroe she was leaving and Kim was there to cover the shop. (Tr. 436-437). Thrower did this because she believed Sheffield required only two people to be present for closing. (Tr. 437).

Thrower knew the process for closing and chose not to stay and complete the task with Monroe. (Tr. 468). Thrower did not have issues with the new rules imposed by Monroe. (Tr. 469). Instead of closing the shop, Thrower took her husband to dinner on November 10, 2017. (Tr. 477).

G. Testimony of Felicia Browning.

Felicia Browning ("Browning") is a barber for Sheffield. (Tr. 482). Browning learned the commission rate was 33% at the April 28, 2017 job fair. (Tr. 484). Browning received an employee manual at the job fair. (Tr. 493). Browning stated the barbers went to the barbershop after the job fair because they still had the keys to it. (Tr. 496). Browning testified completing a employee eligibility verification form before her first day of employment. (Tr. 490-493).

H. Testimony of Holly Arnold.

Holly Arnold ("Arnold") is a Sheffield barber. (Tr. 505). Arnold testified Deardeuff asked her the commission rate in February 2017. (Tr. 506). Arnold was aware the commission rate was 33% as of the job fair. (Tr. 518). Arnold testified an employment eligibility verification form was signed by her on May 2, 2017. (Tr. 511-512). The document reads, "Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer." (Tr. 512). Arnold received the employee handbook at the job fair on April 28, 2017. (Tr. 513). Arnold reviewed the handbook and signed it on May 2, 2017. (Tr. 513). Arnold was

aware of the manual policies and the pay rate when she attended training on May 2, 2017. (Tr. 513).

I. Testimony of Eileen Dinger.

i. Job Fair.

Dinger was present at the job fair on April 28, 2017. (Tr. 526). Bays and/or Deardeuff stated the commission rate would be 33% at the job fair. (Tr. 526). Deardeuff stated she would understand if the barbers rejected the employment offer based on the commission rate. (Tr. 526). Dinger understood she did not have the job until she filled out a W-4 and I-9, which was in the employee packets the barbers returned to her and Bays on May 2, 2017. (Tr. 527).

ii. April 29, 2017 Meeting.

At the April 29, 2017 meeting, Dyson mentioned signing a document with GME, but did not know what it was. (Tr. 530). Dinger noted that while the commission rate dropped, barbers received vacation pay, sick leave, and other benefits under Sheffield's initial terms. (Tr. 530-531).

iii. Interactions With Thrower.

Dinger saw Thrower make Dyson and Kim cry. (Tr. 531-532).

J. Testimony of Arlene Fiori.

Arlene Fiori ("Fiori") works for Sheffield as barber and shop lead. (Tr. 262-263).

i. Job Fair.

At the job fair, Bays spoke about the salary Sheffield was offering, went over the handbook, and talked about Sheffield's expectations. (Tr. 539). Sheffield informed the barbers that the commission rate would be 33%. (Tr. 540). Sheffield also discussed dress code and shop hours. (Tr. 540). Fiori understood the barbers were required to fill out W-2s and I-9s and bring them back to Sheffield. (Tr. 540). Bays then stood up like she was "trying to… cheer the crowd…" and

said, "does everybody want a job," and the barbers all raised their hands. (Tr. 541). Fiori did not believe she was an employee of Sheffield after raising her hand. (Tr. 541). She was not an employee yet because she had to fill out the form I-9 and have a background check. (Tr. 542). On a military base, Fiori agreed there is a required background check with fingerprints. (Tr. 542).

In August 2017, Fiori was offered the manager position. (Tr. 543-544). She informed the barbers through a group text message and received responses that were inappropriate from the barbers. (Tr. 544). After that, Fiori told Sheffield she did not want to be manager. (Tr. 544).

ii. Thrower Interactions.

Fiori interacted with Thrower. (Tr. 546). Thrower pulled Fiori aside in the office and told her Fiori was not going to be a good manager. (Tr. 547). Fiori wrote a letter to the Sheffield owners describing harassment she suffered from Thrower. (Tr. 548). Thrower is 5' 8" or 5' 9". (Tr. 549).

III. Documentary Evidence.

A. General Counsel's Exhibits.

i. GC-1(a)-1(ii).

Exhibit GC-1 contains various documents, marked GC-1(a) through GC-1(ii), regarding the initial charges and complaints filed with the NLRB against Sheffield. (GC-1). The General Counsel introduced Exhibit 1 at the evidentiary hearing. (Tr. 10). Judge Etchingham admitted Exhibit 1 without objection. (Tr. 10).

ii. GC-2.

Exhibit GC-2 is an email sent from General Counsel to David Nowakowski, an attorney for Respondent, about a merit determination and includes a copy of a proposed informal settlement agreement dated August 30, 2017. (GC-2). GC-2 was introduced at the evidentiary hearing (Tr. 11:7-9). Judge Etchingham admitted GC-2 without objection. (Tr. 13),

iii. GC-3.

Exhibit GC-3 is a letter dated August 23, 2017 to Dyson regarding Nellis Barbers Association and proposes an initial bargaining session with the association. (GC-3). GC-3 was introduced at the evidentiary hearing (Tr. 11) and admitted by Judge Etchingham without objection. (Tr. 13).

iv. GC-4.

Exhibit GC-4 contains bargaining session notes from Respondent's counsel for a November 17, 2017 bargaining session. (GC-4). GC-4 was introduced at the evidentiary hearing (Tr. 11) and was admitted by Judge Etchingham without objection. (Tr. 13).

v. GC-5.

Exhibit GC-5 is a letter dated March 3, 2017 sent to the employees of Gino Morena by Yvonna Bays. (GC-5). GC-5 was introduced at the evidentiary hearing (Tr. 60) and admitted without objection by Judge Etchingham (Tr. 61). The letter indicates Sheffield "wants to reach out to current barbers and let them know that Sheffield has job opportunities available." (GC-5). The letter enclosed employment applications and directed that they "should be completed for barbers interested in seeking employment on the new contract." (GC-5). The letter further stated, "after April 17, 2017, Sheffield staff will coordinate a job fair with the applicants to go over company expectations, policies, and to answer questions…" (GC-5).

vi. GC-6.

Exhibit GC-6 is an e-mail chain beginning with a March 21, 2017 e-mail Respondent sent to employees and containing e-mail responses from employees. (GC-6). GC-6 was introduced at the evidentiary hearing (Tr. 62-63) and admitted without objection by Judge Etchingham (Tr. 63). The March 21, 2017 e-mail on page 1 of GC-6 indicates Sheffield will host a job fair to review

employment offerings. (GC-6). The e-mail states Sheffield requires the use of commercial hair removal vacuums, which are the employee's responsibility to purchase. (GC-6, p. 1). The e-mail mentions that new equipment will be installed prior to Sheffield opening the Nellis barbershop. (GC-6, p. 1). The e-mail also states there will be training on "new shop operation policies prior to opening." (GC-6, pp. 1-2).

On March 21, 2017, Dyson and Carpenter responded stating they received the March 21, 2017 e-mail. (GC-6, p. 2). On March 22, 2017, Browning responded confirming receipt as well. (GC-6, p. 3). On April 4, 2017, Fiori responded stating she received the e-mail. (GC-6, p. 4).

On April 13, 2017, Kim responded stating she did not receive the invitation to the job fair. (GC-6, p. 4). On April 14, 2017, Sheffield wrote Kim to invite her to the job fair. (GC-6, p. 5). Sheffield stated it "understands the anxiety being experienced by the current employees with not knowing if you are being offered placement…" (GC-5, p. 5). Sheffield expressly stated, "[t]he purpose of the job fair is to… communicate the standard of performance and operations that we wish to achieve as the new employer, as well as wages and benefits being offered by Sheffield Barbers." (GC-5, p. 5). Accordingly, Sheffield stated, "[t]he job fair will also, be the opportunity that applicant can accept employment or withdraw their applications from placement." (GC-5, p. 5).

vii. GC-7.

Exhibit GC-7 contains emails exchanged between Sheffield and Thrower. (GC-7). GC-7 was introduced at the evidentiary hearing (Tr. 72) and admitted by Judge Etchingham without objection (Tr. 74).

viii. GC-8.

Exhibit GC-8 is a statement signed by Deardeuff describing meeting on May 3, 2017 between Respondent and the barbers at Nellis. (GC-8). GC-8 was introduced at the evidentiary hearing (Tr. 66) and admitted by Judge Etchingham for impeachment purposes (Tr. 68).

ix. GC-9.

Exhibit GC-9 is the schedule that the barbers at Nellis were working when Sheffield took over operations. (GC-9). GC-9 was introduced at the evidentiary hearing (Tr. 78) and admitted by Judge Etchingham without objection (Tr. 78-79).

x. GC-10.

Exhibit GC-10 is the schedule issued to the employees by Respondent on September 1, 2017. (GC-10). GC-10 was introduced at the evidentiary hearing (Tr. 79) and admitted by Judge Etchingham without objection (Tr. 79-80).

xi. GC-11.

Exhibit GC-11 is the schedule issued one week after the schedule contained in GC-10. (GC-10). The General Counsel introduced GC-11 at the evidentiary hearing (Tr. 83) and it was admitted by Judge Etchingham without objection (Tr. 84).

xii. GC-12.

Exhibit GC-12 is a written discipline that Monroe issued to Thrower on November 11, 2017 for insubordination. (GC-12). The General Counsel introduced GC-12 at the evidentiary hearing (Tr. 92:21-24). Judge Etchingham admitted GC-12 without objection. (Tr. 93).

xiii. GC-13.

Exhibit GC-13 contains two written disciplines issued to Thrower. (GC-13). The General Counsel introduced GC-13 at the evidentiary hearing. (Tr. 100). Judge Etchingham admitted GC-13 without objection. (Tr. 101).

xiv. GC-14.

Exhibit GC-14 is a document containing the definitions of insubordination, bullying and disrespect issued to all employees at Nellis by Monroe. (GC-14). The General Counsel introduced GC-14 at the evidentiary hearing. (Tr. 104). Judge Etchingham admitted GC-14 without objection. (Tr. 232).

xv. GC-16.

Exhibit GC-16 is the collective bargaining agreement between GME and the Association. (GC-16). The General Counsel introduced GC-16 at the evidentiary hearing. (Tr. 270). Judge Etchingham admitted GC-16 over Respondent's objection. (Tr. 274-275).

xvi. GC-17.

Exhibit GC-17 is an email received by Respondent from Dyson on November 21, 2017. (GC-17). The General Counsel introduced GC-17 at the evidentiary hearing (Tr. 86). Judge Etchingham admitted GC-17 over Respondent's counsel's objection (Tr. 88).

xvii. GC-19.

Exhibit GC-19 is a copy of the note written by Deardeuff and given to Arnold during Respondent's site visit at Nellis. (GC-19). The General Counsel introduced GC-19 at the evidentiary hearing. (Tr. 57). Judge Etchingham admitted GC-19 without objection. (Tr. 57-58).

xviii. GC-20.

GC-20 is Thrower's complete personnel file (redacted). (GC-20). GC-20 was introduced at the evidentiary hearing. (Tr. 13-14) and admitted without objection by Judge Etchingham. (Tr. 15).

xiv. GC-21.

Exhibit GC-21 is the subpoena duces tecum sent by General Counsel to Respondent. (GC-21). GC-21 was introduced at the evidentiary hearing (Tr. 22) and admitted into evidence by Judge Etchingham without objection. (Tr. 24).

xx. GC-22.

Exhibit GC-22 is a pay stub for Kimfrom when she was employed by GME. (GC-22). GC-22 was introduced at the evidentiary hearing. (Tr. 148). Judge Etchingham admitted GC-22 without objection. (Tr. 148).

B. Sheffield's Exhibits.

i. Exhibit R-8.

Exhibit R-8 is the back page of the collective bargaining agreement between the Nellis Barbers Association and Rex Morena dated August 15, 2014 that was sent to Respondent via email on August 14, 2017. (R-8). Respondent introduced Exhibit R-8 at the evidentiary hearing. (Tr. 197). Judge Etchingham admitted Exhibit R-8 without objection. (Tr. 226).

C. Joint Exhibits.

i. Exhibit J-1.

Exhibit J-1 is AAFES' response to Respondent's subpoena addressed to an employee of AAFES outlining the reasons why said employee would not be produced to testify at the

evidentiary hearing. (J-1). J-1 was introduced at the evidentiary hearing. (Tr. 39). Judge Etchingham admitted Exhibit J-1 without objection. (Tr. 39).

I. Legal Standard.

Under Section 8(a)(1), it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7" of the Act. *National Dance Institute—New Mexico, Inc. and Diana M. Orozco-Garrett*, 364 NLRB No. 35 (N.L.R.B.), 2016 WL 3457656 (June 23, 2016). The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…" *Id.* "The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed by the Section 7 of the Act." *Id*. (internal citations omitted). "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *Id*.

Section 8(a)(5) provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. It is a violation of the employer's duty to bargain in good faith to unilaterally change the conditions of employment presently under negotiation. *See NLRB v. Katz*, 369 U.S. 736, 743, (1962); *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1381 (8th Cir. 1993). Such action by the employer "is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *Katz*, 369 U.S. at 743. Therefore, the General Counsel must show, by a preponderance of the evidence, that Sheffield made unilateral changes to the conditions of employment under negotiation.

A. Sheffield Was Not A Perfectly Clear Successor To GME.

Sheffield was not a perfectly clear successor to GME at Nellis, thereby precluding any argument that Sheffield was bound by the terms set forth in any purported pre-existing CBA and not permitted to set initial terms and conditions of employment at Nellis.

The U.S. Supreme Court established the "perfectly clear successor" exception in *Burns*. *NLRB v. Burns Security Services*, 406 U.S. 272, 279 (1972). In that case, the Court enunciated the fundamental principle that "a successor employer is ordinarily **free to set initial terms on which it will hire employees of a predecessor**."[1] *Id.* (emphasis added). This principle controls except in "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit…" *Id.* The Court in *Spruce Up* examined this exception carefully and provided substantial analysis in dicta that has since become a holding. *See Spruce Up Corp.*, 209 NLRB 194 (N.L.R.B. Feb. 22, 1974); *see also, Nexeo Solutions, LLC,* 364 NLRB No. 44, slip op at 6 (2016).

The *Nexeo* and *Spruce Up* courts held the perfectly clear successor exception in *Burns* should be restricted to "circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would be retained **without change in their wages, hours, or conditions of employment**, or at least to circumstances where the new employer… has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Nexeo,* 354 NLRB No. 44. at **3 (emphasis added). Stated another way, to avoid "perfectly clear" successor status, "a new employer must clearly announce

[1] The *Burns* Court accorded much significance to the successor employer's freedom to alter the enterprise: "[H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in **serious inequities**. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital." *Burns*, 406 U.S. at 287–88 (emphasis added).

its intent to establish a new set of conditions prior to, or simultaneous with, its expression of intent to retain the predecessor's employees." *Walden Security, Inc.*, 2017 WL 2954356 (July 7, 2017).

Here, the evidence establishes Sheffield was not a perfectly clear successor based on communications Sheffield sent to the predecessor employees prior to the April 28, 2017 job fair and contract commencement on May 2, 2017. First, Sheffield sent a March 3, 2017 letter (designated GC-5) to the predecessor employees, who then sent applications back to Sheffield. (Tr. 60-62). In the March 3, 2017 letter, Sheffield indicated it was "accepting applications for barber positions that include our Nellis AFB contract," that applications should be completed and returned so "initial screening can be completed," and that Sheffield "looks forward to receiving applications from the barber [sic] who wish to apply for employment…" Critically, Sheffield also stated it would host a job fair with the applicants to "go over company expectations, policies, and to answer questions…"

The following inferences may be drawn from the above statements: (1) Sheffield did not intend to guarantee employment to all predecessor employees; (2) Sheffield required those interested in jobs to submit job applications; (3) the applicants would go through a screening process; and (4) the purpose of the job fair was for Sheffield to explain and set initial terms and conditions (expectations and policies) that were obviously going to be different from the predecessor's terms and conditions. Moreover, the fact that Sheffield specifically reserved time at the job fair to review its expectations and policies with the applicants—along with the substantial evidence Sheffield clearly communicated its intentions to set different terms—should preclude any inference or argument Sheffield mislead employees into believing terms and conditions would remain identical to what they were under the predecessor.

Sheffield's March 21, 2017 follow-up correspondence after receiving applications further supports the inferences stated above. On March 21, 2017, Sheffield sent an e-mail to the barbers thanking them for submitting applications and inviting them to the job fair. (GC-6, p. 1). The March 21, 2017 e-mail alerted the predecessor employees to at least one material change in their terms and conditions: the requirement that the barbers pay for commercial hair removal vacuums. (GC-6, p. 1). Sheffield mentioned the installation of new equipment. (GC-6, p. 1). Sheffield further explained training would be provided as to "new shop operation policies prior to opening." (GC-6, pp. 1-2). Sheffield also sent a second e-mail to Kim inviting her to the job fair and explaining the purpose of the job fair was to "communicate the standard of performance and operations that we wish to achieve as the new employer, as well as wages and benefits being offered by Sheffield Barbers." Sheffield also explained, "[t]he job fair will also, be the opportunity that applicant can accept employment or withdraw their applications from placement." (GC-5, p. 5).

These inferences are bolstered by the testimony of Sheffield's employees. Carpenter testified she received Sheffield's March 21, 2017 correspondence. (Tr. 275). On March 21, 2017, Dyson and Carpenter responded stating they, too, received the March 21, 2017 e-mail. (GC-6, p. 2). On March 22, 2017, Browning responded confirming receipt as well. (GC-6, p. 3). On April 4, 2017, Fiori responded stating she received the e-mail. (GC-6, p. 4). Thrower testified she received the March 21, 2017 e-mail. (Tr. 427). Carpenter believed as of April 28, 2017 that she and the other employees were still employees of GME. (Tr. 313-314). Importantly, none of the witnesses testified (and no evidence demonstrtes) they were confused or mislead by Sheffield to believe there would be no changes to the terms and conditions of employment with the transition to Sheffield.

Moreover, Dyson, Thrower, Carpenter, Browning, Arnold, agree with Deardeuff, Fiori, and Dinger that the commission rate was provided at the April 28, 2017 job fair. (Tr. 65, 278, 356-357, 429, 484, 518, 540). While there is some dispute over the chronological order of the job fair (and whether employees were asked to raise their hands to accept employment *before* or *after* being told the commission rate), it is clear that Sheffield had no intention of misleading the barbers to believe they would be paid exactly the same amount as they were under GME. The record is clear: the barbers were not mislead; rather, they were (understandably) upset their commission was lower and erroneously believed the CBA required Sheffield to pay the old rate. With knowledge of the new commission rate, Carpenter, Browning, and Dyson still chose to attend training, fill out employment paperwork, and accept employment with Sheffield.

This case is similar to *S & F Market* and *Ridgewells*. In *S & F Market*, the new employer provided a letter with each job application indicating there would be "operational changes," identified employment tests to be passed, and required affirmation of understanding of temporary and at will employment. *S & F Mkt. St. Healthcare LLC v. NLRB*, 570 F.3d 1355 (D.C. Cir. 2009). The Board concluded "the employees had every indication—from S & F's job applications, interviews, and letters offering employment—that S & F intended to institute new terms of employment. *Id.* at 1360. Similarly, in *Ridgewells*, the new employer announced during a meeting that it would change the workers' statuses from employees to independent contractors. *Ridgewell's Inc.*, 334 N.L.R.B. 37, 37 (2001). This announcement "clearly signaled that the [new employer's] initial terms and conditions of employment would differ." *Id.*

Here, as in *S & F*, Sheffield's correspondence indicated it would review company expectations and policies during a job fair and impose a new condition (e.g., that employees must provide their own commercial hair vacuums). Like *Ridgewells*, at the job fair meeting, Sheffield

clearly announced the commission rate would be 33%, rather than that received under GME. These communications and statements could not be described as misleading. The barbers understood the message because they arranged for a subsequent meeting on April 29, 2017 to discuss the commission rate. The totality of the circumstances demonstrates the employees were notified that there would be changes to the terms and conditions of employment with Sheffield.

B. Sheffield Did Not Hold Itself As If It Would Adhere To the Terms of the Predecessor's CBA.

The record is replete with evidence Sheffield refused to adhere to the CBA mentioned by the barbers at the meetings held on April 28, 2017 and April 29, 2017. For just a few examples, Dyson, Carpenter, Thrower, and Arnold testified Sheffield told them the CBA was fake and did not matter. (283, 336, 432, 508). Recent case law is clear: "[a] successor set on retaining its predecessor's employees may dispel this perfectly clear intention by giving employees prior notice of its intention to institute its own initial terms or by holding itself as if it will not adhere to the terms of the previous collective bargaining agreement." *Creative Vision Resources, LLC v. National Labor Relations Board*, 872 F.3d 273, 281 (5th Cir. 2017).

Here, the record demonstrates Sheffield had no knowledge that a CBA at Nellis even existed until April 28, 2017, at the earliest. Deardeuff testified Sheffield received no CBA included with the bid solicitation from AAFES. (Tr. 116). Moreover, Sheffield asked AAFES whether there was a CBA at Nellis and the response was in the negative. (Tr. 117-118). Based on this evidence, Deardeuff's understanding was there was neither a CBA nor a union at Nellis. (Tr. 132). Accordingly, Deardeuff doubted the validity of any CBA at Nellis.[2] (Tr. 138). Dyson did not share

[2] Moreover, Dyson's testimony (along with Deardeuff's testimony as to the invalidity of the 2014 CBA) confirms any CBA existing at Nellis was employer dominated. Dyson testified she became involved in the association when GME contacted her and she was "deemed the negotiator [by the employer]." (Tr. 362-63). Dyson said there was no barber association at that time [prior to the 2014 CBA]. (Tr. 361). Dyson stated "we would receive a contract, and we were told to read it and sign it… We were never told we that we could bargain… until '14." (Tr. 362). Dyson said the only

the CBA with Sheffield. (Tr. 374). On or about April 29, 2017, according to Dinger, the Nellis employees first mentioned a CBA. (Tr. 526). At that time, Sheffield firmly maintained its offer of 33% commission and did not hold out to adhere to the CBA, telling the barbers "if you can't accept this employment, we understand." (Tr. 530).

Sheffield never held out to the barbers that it would adhere to the terms of a predecessor CBA which Sheffield had no knowledge of and believed to be invalid. Therefore, Sheffield was not a perfectly clear successor and was entitled to establish initial terms and conditions of employment, including setting the commission rate at 33%.

C. The Barbers Did Not Accept Employment Until May 2, 2017.

The record demonstrates the barbers did not accept employment until May 2, 2017—not April 28, 2017. Arnold signed the Employment Eligibility Verification form on May 2, 2017. (Tr. 511-512). That form indicates it should not be completed before accepting a job offer. (Tr. 512). Dinger indicated the Form W-4s and I-9s were submitted to her and Bays on May 2, 2017. (Tr. 527). Carpenter reviewed the handbook after the job fair and signed the certificate of understanding on May 1, 2017. (Tr. 291). Dyson signed the employee handbook on May 2, 2017. (Tr. 384). Dyson admitted, "the 33% [commission rate] was brought up when we were asked if we wanted the job." (Tr. 336-337). Consistent with that testimony, Dyson agreed she chose to work for Sheffield with knowledge of the 33% commission rate. (Tr. 385). Fiori also agreed she was not an employee yet as of raising her hand at the job fair because she still had to complete and submit a Form W-4 and I-9. (Tr. 542).

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difference between the contract prior to 2014 that was not negotiated and the 2014 contract was the pay decreased from 47% to 45%. (Tr. 368). This testimony makes it abundantly clear both the 2011 contract and the 2014 purported CBA between GME and the barbers association were employer dominated in that GME drafted the agreement, selected the bargaining representative, and sent the agreement to the representative for signature.

D. Alternatively, The Barbers Were Not Misled To Believe No Changes to Terms and Conditions Would Occur.

Sheffield informed employees of the changes to terms and conditions of employment prior to the offer of employment through the correspondence discussed above. Alternatively, Sheffield informed the employees of changes simultaneously with the offers of employment because the predecessor employees were afforded a reasonable period of time to consider and reject the employment offers prior to training and shop opening. "[I]ncumbents informed of the availability of employment with the successor entity but contemporaneously notified of substantial changes in the conditions thereof are not lulled into a false sense of security." *Int'l Ass'n of Machinists & Aerospace Workers*, 595 F.2d 664, 675 (D.C. Cir. 1978).

In *S & F*, the Board explained that "at bottom the 'perfectly clear' exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees it misled or lulled into not looking for other work." *S & F*, 570 F.3d at 359. Here, the record precludes an argument that the employees were lulled or induced into not looking for other work. Not only did the March 3, 2017 and March 21, 2017 correspondence place the employees on notice that Sheffield was a new employer with new expectations and policies, but the April 28, 2017 job fair meeting made it even more obvious that Sheffield would not continue to utilize the same terms and conditions as GME. As of the April 28, 2017 meeting, the barbers were still GME employees for at least two to three more days (Sheffield commenced operations on May 1, 2017). The announcement at the job fair meeting gave the barbers ample time to decide whether to move forward with Sheffield or seek other employment.

Moreover, there is no evidence the barbers mistakenly believed employment terms and conditions would not change. Sheffield was not contacted regarding bargaining until Sheffield initiated that contact after the May 22, 2017 unfair labor practice charge filed by Dyson.

Sheffield's correspondence to the barbers in March 2017 does not indicate all of the predecessor employees would be hired or that the new hires would work under identical terms and conditions as they did under GME. (GC-5 and GC-6). Dyson admitted at the time of the April 28, 2017 job fair, she did not know what the pay rate would be. (Tr. 332). Dyson further admitted she and the barbers considered walking out on Sheffield after the job fair. (Tr. 335). Dyson's testimony reveals she did not expect to receive the same commission rate that she did at GME and that she and the barbers understood after the April 28, 2017 job fair that they could walk out and not work for Sheffield. Sheffield never misled the barbers to believe terms and conditions would be the same as they were with GME.

E. The Testimony of General Counsel's Witnesses As To Accepting Employment With Sheffield Is Inconsistent.

General counsel may argue Sheffield made unilateral changes to the commission rate based on the testimony of General Counsel's witnesses that they raised their hands to accept employment with Sheffield prior to Sheffield announcing the 33% commission rate at the April 28, 2017 job fair. The testimony of these individuals is wildly inconsistent as to basic elements of the April 28, 2017 meeting, such as its length, what was said, the order in which topics were discussed, whether certain documentation was handed out and turned in, who spoke at the meeting, and what occurred afterwards. For example, Carpenter testified, both that the barbers were told they were hired and *then* handed in their cosmetology licenses and seconds later contradicted herself by testifying the barbers handed in the cosmetology licenses and *then* "[Sheffield] told us we would all be hired." (Tr. 278). Carpenter said the April 28, 2017 meeting was less than a half hour long. (Tr. 312). Dyson stated, "the 33% [commission rate] was brought up when we were asked if we wanted a job. (Tr. 356-57). Dyson further stated about the timing of the announcement of the commission rate, "it could have been before or after or in between when the sisters were introduced. I'm not,

you know, I'm not certain on that." (Tr. 359). Dyson testified the job fair lasted "about an hour and a half." (Tr. 360). Browning expressed confusion about this issue, asking the Court "are we supposed to go off of accepting the job, or the first day I started at the barbershop?" (Tr. 493). Browning estimated the April 28, 2017 job fair lasted "more than an hour." (Tr. 493).

Based on the above-mentioned inconsistent testimony which is contradicted by the testimony of Deardeuff, Dinger, and Fiori (as to when employment was offered and what was said at the meeting, as well as its length), it is difficult to ascertain when the commission rate was announced and when employees raised their hands. However, the General Counsel's witnesses largely admitted to reviewing the handbook after the job fair and choosing to work for Sheffield with knowledge of the 33% commission rate. The totality of the circumstances demonstrates the barbers were not misled by Sheffield and had ample time to decide whether to accept employment with knowledge that the terms and conditions of employment were changing.

F. After May 2017, Sheffield Engaged In Collective Bargaining In Good Faith And Did Not Engage In Any Retaliatory Actions.

A union and employer have the obligation "to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement" and a "sincere effort . . . to reach common ground." *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943). In instances involving the timing and circumstances under which negotiations are to take place, the Board holds "matters of this kind are to be discussed and not imposed by one party on the other. . . . [t]he vice lies in the attempt to force capitulation by declining to agree to any future bargaining session unless the Union acceded to this nonsubstantive, procedural demand." *Caribe Staple Co., Inc.*, 313 NLRB 877, 890 (N.L.R.B. Feb. 28, 1994). The employer's refusal to bargain until the union sent a "complete, legible copy of the union's contract proposals" was reasonable where the

original proposals the union sent were illegible and missing material terms. *American Warehouse & Distrib. Serv., Inc.*, 311 NLRB 371, 389 (N.L.R.B. May 28, 1993).

Here, Sheffield has not failed to bargain. Indeed, during the transition and shortly after commencing operations at Nellis, Sheffield had no knowledge of the existence of a union or CBA. (Tr. 116-118). Dyson admitted she did not request to bargain with Sheffield prior to filing the first unfair labor practice charge on May 22, 2017. (Tr. 389-390). Dyson further admitted that, shortly after filing the charge, Sheffield contacted her to engage in bargaining. (Tr. 390-391). Finally, Dyson admitted Sheffield had been willing to bargain and has participated in several bargaining sessions with the union. (Tr. 390-391). The evidence demonstrates Sheffield did not fail to bargain with the Association.

G. The Commission Rate Never Changed.

The General Counsel claims Sheffield unilaterally changed terms and conditions of employment by increasing the commission rate from 33% to 45% without notice or opportunity to bargain given to the union. The General Counsel's argument is unsupported by the record. Deardeuff testified the commission rate always remained 33% after it was initially set by Sheffield. (Tr. 200-203). Sheffield increased compensation to its employees by 12% for a period of time around September to October of 2017. (Tr. 200-203). Sheffield paid this additional compensation for as long as it was able to. (Tr. 200-203). This change was discussed at a bargaining session. (Tr. 200-202). The barbers demanded 45% commission and wanted back wages going back to commencement of operations. (Tr. 202). Sheffield could not afford to pay back wages, so Sheffield voluntarily paid 12% additional compensation for as long as it could to appease the barbers. (Tr. 202). However, Deardeuff clarified wages are staying the same until there is a determination by the Department of Labor. (Tr. 203). The record demonstrates the commission

rate did not change after it was initially set by Sheffield at 33%; rather, additional compensation was paid to barbers for about four pay periods. (Tr. 85). Because the commission rate never changed after being initially set, the General Counsel's claim that Sheffield made unilateral changes to the commission rate should be dismissed.

II. Sheffield Lawfully Discharged Thrower.

A. Legal Standard.

Section 10(c) of the Act states, "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause." However, where, as here, Sheffield and the Union were engaged in arm's length negotiations over a new CBA, the NLRB has articulated a different rule. The NLRB has found that discipline is a mandatory subject of bargaining and, therefore, discretionary discipline may not be unilaterally imposed without first providing the bargaining representative notice and the opportunity to bargain. *Total Security Management Illinois 1, LLC and International Union Security Police Fire Professionals of America* (*SPFPA*), 2016 WL 4548858 (Aug. 26, 2016). Moreover, "the employer **need not bargain to agreement or impasse**, if it commences bargaining promptly." *Id.* at *10 (emphasis added). If exigent circumstances exist, the employer may act prior to bargaining if it provides notice to the bargaining representative and an opportunity to the bargain immediately following the decision. *Id.* In those circumstances, the employer must continue bargaining until agreement or impasse. *Id.* Exigent circumstances are defined as "situations where the employer reasonably and in good faith believes that an employee has engaged in unlawful conduct that poses a significant risk of exposing the employer to legal liability for the employee's conduct, or threatens safety, health, or security in or outside the workplace." *Id.*

B. Sheffield Notified The Union and The Union Agreed With The Discharge.

As Dyson agreed to the discharge and was an active participant in the disciplinary meetings on November 11, 2017, including signing the disciplinary document that would effectuate the termination, no further bargaining regarding the termination was necessary. Witness testimony demonstrates there were several occasions throughout the disciplinary meetings on November 11, 2017, wherein Dyson clearly stated her approval and agreement with Thrower's termination, rendering bargaining on the issue unnecessary. Dyson described Thrower "a hothead" who "gets real upset real quick." (Tr. 252). According to Monroe, Dyson said Thrower "set herself up [for termination]" and "deserved it." (Tr. 257). Monroe testified Dyson agreed to the termination, signed off the related paperwork, and was 100% on board with the discharge. (Tr. 256-57). The record demonstrates Dyson agreed to the termination and signed off on the documents relating thereto. (Tr. 256). Dyson raised no objections to the termination until two days later, when she asked if Thrower could be suspended for two weeks rather than be terminated. (Tr. 256). By that point, Sheffield understood agreement had been reached as to the discharge and there was no further need to bargain.

Thrower's actions (e.g. bullying, harassment, intimidation, insubordination, etc.), documented by witness testimony and disciplinary records in her personnel file, constitute misconduct for which she was lawfully discharged from her employment with Respondent.

C. Alternatively, Exigent Circumstances Existed Justifying Thrower's Immediate Discharge.

General Counsel will argue there are no exigent circumstances justifying Thrower's discharge. However, the record demonstrates Thrower's misconduct cultivated exigent circumstances warranting her immediate discharge. Thrower presented a danger to Respondent's business due to her uncontrollable yelling on the shop floor, insubordination, and unprofessional

behavior toward manager Monroe. (Tr. 241, 243). Further, Thrower demonstrated a lack of respect for her place of employment, such that the barbershop had failed a sanitation inspection in part due to the conditions at her station, jeopardizing health and safety in the workplace. (Tr. 239-240). Similarly, Thrower's refusal to close the shop created a risk to the security of the shop, since Kim did not know how to close properly. Thrower understood closing to involve closing the register and counting the funds in the register. (Tr. 464). By leaving Kim to close the shop (or perform some part of those duties along with Monroe), Thrower created a risk of mishandling funds in the register, which jeopardized Sheffield's security. By engaging in a shouting outburst on the shop floor and bullying her coworkers, Thrower jeopardized health in the workplace by creating a stressful and hostile work environment which alienated her coworkers as well as customers.

D. Alternatively, Thrower's Discharge Was For Cause, Precluding Backpay and Reinstatement Awards.

The Board recognizes the affirmative defense that the discipline was "for cause" as the term is used in Section 10(c) of the Act and, therefore, reinstatement and backpay may not be awarded. Section 10(c) states, "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause." To establish the termination was for cause, Respondent must show: (1) the employee engaged in misconduct; and (2) the misconduct was the reason for the suspension or discharge. *Total Security*, 364 NLRB No. 106 at *18.

Here, Respondent discharged Thrower for cause. The evidence demonstrates Thrower engaged in misconduct which included insubordination, bullying, and disrespectful behavior. Thrower herself admitted she disobeyed Monroe (her superior) by refusing to stay and close the shop on November 10, 2017. (Tr. 436-37). Deardeuff indicated Thrower was counseled for

leaving the shop on November 10, 2017. (Tr. 95). On November 11, 2017, Deardeuff met with Kim, who was crying inconsolably and distraught about something Thrower said to her. (Tr. 98). Deardeuff lawfully terminated Thrower for cause. (Tr. 99; GC-12 and GC-13).

The above testimony is consistent with GC-12 and GC-13, which are disciplinary write-ups Sheffield issued to Thrower for insubordination and bullying. In GC-12, Monroe indicated Thrower was insubordinate and disrespectful towards her. (GC-12). In GC-13, Monroe details that, after Thrower was issued GC-12, Thrower caused a scene on the shop floor and yelled that it was Kim's fault she received discipline. (GC-13, p. 1). GC-13 includes another disciplinary write-up indicating Thrower was counseled for refusing to stay and close the shop and then threatened Kim regarding the same. (GC-13, p. 2). The write-up goes on to state Sheffield will not tolerate bullying or cultivation of a hostile work environment and, because Thrower engaged in both, she was no longer employed. (GC-13, p. 2). Dyson signed all three disciplinary write-up forms contained in GC-12 and 13.

Kim's testimony further bolsters the fact that Sheffield terminated Thrower for cause. Kim stated Thrower was angry with Kim for closing the shop and shouted at her. (Tr. 146). Whereas Thrower said Kim had closed the shop many times, Kim denied this, stating she had only done it twice and did not know how to do it by herself. (*Cf.* Tr. 146 and Tr. 244). Monroe testified Thrower caused a scene in the shop in front of customers, questioned Monroe's managerial authority, mocked Monroe, acted disrespectfully towards Monroe, and left early when ordered to stay and close with Monroe. (Tr. 240-46).

Dyson's testimony is less than credible, as she changed her testimony several times. Specific to Thrower's termination, Dyson testified that she signed Thrower's discipline. (Tr. 346). Dyson then went on to testify that while she did not see or read one of the disciplinary reports she

signed, although it clearly bears her signature. (Tr. 346). Dyson testified GC-13 was the disciplinary write up that she signed that had been torn up (Tr. 345) and yet could not explain why it was torn up. (Tr. 345).

The record demonstrates Thrower was terminated for cause and the Court should be precluded from ordering backpay or reinstatement if it finds Sheffield failed to bargain regarding Thrower's termination.

CONCLUSION

The evidence presented at the Hearing established that Sheffield did not unilaterally change the commission rate because it had the right to set initial terms and conditions of employment. The evidence shows Sheffield unambiguously communicated its intentions to set initial terms and conditions of employment to the predecessor employees through correspondence sent in March 2017 and at the April 28, 2017 job fair. In the correspondence, Sheffield requested those interested in employment to submit job applications, explained that applicants would be screened, indicated new employees would be required to pay for commercial hair vacuums, and explained that new job expectations and policies would be explained at the job fair. At the job fair, Sheffield expressly told the former GME employees what the commission rate would be, discussed other benefits, terms, and conditions, and, in light of this information, offered employment to applicants who were still interested. There is no evidence Sheffield misled the predecessor employees to believe they would receive the same rate of pay as they did under GME. The record demonstrates the Nellis barbers were aware new conditions would be imposed prior to accepting employment with Sheffield.

After commencement of the contract, Sheffield did not fail to bargain because it received no request to bargain until Dyson filed her first unfair labor practice charge alleging failure to

bargain on May 22, 2017. After that date, the record demonstrates Sheffield willingly and in good faith participated in several bargaining sessions and provided information to the union through communications with Dyson. The bargaining between Sheffield and the union is ongoing.

The evidence presented at the hearing also demonstrates Sheffield did not discriminatorily discharge Thrower. Rather, Thrower's temper, insubordination, and treatment of other employees led to her termination. No credible evidence suggests the discharge was related to—much less caused by—Thrower's engagement in protected activities. The evidence shows Sheffield would have terminated Thrower absent any alleged participation in concerted activities. Moreover, because Sheffield discharged Thrower for cause, the Court should be precluded from ordering backpay or reinstatement should it find Sheffield failed to bargain with regards to Thrower's discharge.

In light of the above, the Board should find the General Counsel did not meet its burden of establishing Sheffield violated Sections (1) and (5) of Section 8 of the NLRA. Sheffield respectfully requests dismissal of the Consolidated Complaint, and for such other and further relief as this Honorable Board deems just and appropriate under the circumstances.

Respectfully submitted,

By: */s/ Kevin J. Dolley*

Kevin J. Dolley, #54132
David Nowakowski, #66481
LAW OFFICES OF KEVIN J. DOLLEY, LLC
2726 S. Brentwood Blvd.
St. Louis, MO 63144
(314) 645-4100 (office)
(314) 736-6216 (fax)
kevin@dolleylaw.com
david.nowakowski@dolleylaw.com

Attorneys for Sheffield Barbers, LLC

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served upon the following on March 21, 2018 via electronic mail:

Stephen Kopstein
National Labor Relations Board, Region 28
300 Las Vegas Boulevard South
Suite 2-901
Las Vegas, NV 89101
stephen.kopstein@nlrb.gov

/s/ Kevin J. Dolley